

## ***5 Official Opinions of the Compliance Board 139 (2007)***

**NOTICE REQUIREMENTS – TIMING - JUSTIFICATION  
FOR NOTICE SHORTLY BEFORE MEETING – CLOSED  
SESSION PROCEDURES – WRITTEN STATEMENT –  
FAILURE TO PREPARE, HELD TO BE A VIOLATION –  
MINUTES – CONTENTS – FAILURE TO DESCRIBE  
TOPIC OF CLOSED SESSION, HELD TO BE A  
VIOLATION**

April 17, 2007

*Haley P. Tate, DDS*

The Open Meetings Compliance Board has considered your complaint alleging that the governing body of the Town of New Market violated the Open Meetings Act in connection with meetings on December 29, 2006 and January 11, 2007. The allegation about the December 29 meeting was of inadequate advance notice. The allegations about the January 11 meeting involved both inadequate notice and a closing of the meeting without adherence to the procedural requirements of the Act.

For the reasons explained below, we have doubts about the adequacy of notice provided in advance of the December 29 meeting; however, based on the limited record before us, we can offer only a contingent conclusion on this issue. We conclude that the governing body did not violate the Act in connection with the timing of the notice in advance of the January 11, 2007 meeting. Finally, we conclude that the Act was violated in connection with the January 11 closed session, in that a required written statement was not prepared and the description included in publicly available minutes following the session was legally deficient.

## I

**Complaint and Response**

According to the complaint, the Town governing body<sup>1</sup> held a special meeting on December 29 to vote on an annexation issue, a matter that has been “widely contested” and on which numerous meetings had been held. While the Mayor reportedly promised ample notice of the Council’s vote, on December 28 at approximately 6:00 p.m., a Council member distributed an e-mail informing its recipients that the vote was scheduled to occur the following evening. The complaint indicated that the only people to receive notice were those whose e-mail addresses were available to the Council member and then only 24 hours in advance of the meeting. A copy of the e-mail was included with the complaint. The complaint indicated that it was the governing body’s position that the annexation had to be resolved by the end of the year to avoid a change in State law affecting annexations.

The complaint also indicated that the following month, the governing body conducted an improperly closed session by not complying with the procedural requirements for closing a meeting under the Act. Citing the *Open Meetings Act Manual* published by the Office of the Attorney General, the complaint noted that before closing the session, a vote must be taken and that the presiding officer must ensure that a written statement is prepared, setting out the reason for closure, the statutory authority under the Open Meetings Act allowing the session to be closed, and the topics to be discussed. The complaint is premised on past practice of the governing body, noting that “virtually ALL of the [prior] closed ‘executive’ sessions held by this mayor have garnished the vague title ‘confer with legal counsel [sic].’” The complaint suggested that votes were not taken and, following the sessions, results of the sessions have not been disclosed.

The complaint also questioned whether the governing body provided proper notice of the January 11 session. According to the complaint, the Mayor said that the session was a continuation of a previous meeting, but there is no record that a closed session was to occur. While the Mayor apparently indicated that he had mentioned the meeting to a reporter about two days before the meeting, the reporter indicated

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<sup>1</sup> The complaint referred to the Mayor and Town Council. Under the Town’s governing structure, all legislative powers are vested in the Council and the Mayor serves as chief executive officer. New Market Charter, §§ 23-5 and 23-21(a), 5 *Municipal Charters of Maryland* ch. 104. However, the Mayor does serve as president of the Council, without a vote. *Id.*, § 23-10. A special meeting may be called by either the Mayor or the clerk of the Council at the request of the Mayor or a majority of the Council. *Id.*, 23-8. Of course, the Mayor alone cannot violate the Open Meetings Act, because the Mayor is not a “public body.” Since responsibility for compliance with the Act ultimately lies with the public body itself, throughout this opinion we shall simply refer to the Town’s governing body, encompassing the Council as well as the Mayor as its presiding officer.

that she was told merely that a meeting “might” occur. The complaint noted the Mayor’s statement that notice was posted on the Town’s bulletin board and an e-mail was sent at 1:00 p.m. the day of the meeting.

William C. Wantz, Esquire, submitted a timely response on behalf of the Town governing body. The response was limited to the special meeting held on December 29 and the closed session on January 11, 2007. The response noted that the complainant acknowledged receiving notice of the December 29 meeting by e-mail. The response indicated that the governing body’s practice is to give notice of its meetings by several methods, including posting notice of meetings on the Town’s website and, in the case of special meetings, posting notice on the Town’s bulletin board. On the day that notice of the December 29 meeting was posted on the website, there was an interruption in the Town’s web service; however, notice apparently was posted on the bulletin board.

The response noted that the circumstances of the December 29 meeting were unusual, and the time frame for notice was constrained, given a legislative deadline affecting the annexation process. Under the circumstances, the governing body’s position is that it “acted with appropriate diligence ... and made every effort to provide reasonable and timely notice of the special meeting as soon as the date and time thereof were established” and that the notice given was “reasonable.”

As to the meeting of January 11, 2007, the response indicated that a recorded vote to close the meeting occurred and the purpose of closing the meeting, “conferring with legal counsel,” was reflected in the motion. The response identified pending litigation in which the Town was added as a defendant. According to the response, the subject matter discussed “was both confidential and within the attorney-client privilege.” Enclosed with the response was a copy of the publicly available minutes of January 11, indicating the time and place of the closed session, identifying those present, and indicating that “[the] purpose ... was to confer with the town legal counsel, Mr. William Wantz.” The response also indicated that Mr. Wantz has “reminded the Mayor, as presiding officer, to make a written notation or statement of the reason for closing a meeting....”

## **II**

### **Meeting of December 29, 2006: Notice**

Before a public body conducts a meeting that is subject to the Open Meetings Act, the body is required to give “reasonable advance notice of the session.” §

10-506(a).<sup>2</sup> Rather than prescribing a specific notice period, this standard reflects the Legislature's recognition that public bodies occasionally must meet outside their usual meeting sequence. 4 *OMCB Opinions* 99, 101 (2004). Whether advance notice is "reasonable" depends on the specific facts, especially the time interval between the public body's decision to meet and the posting of notice. For example, we found no violation when a public body gave notice of a meeting three hours before the meeting, given unusual circumstances that precluded confirming the time of the meeting until contract language to be considered at the meeting had been finalized. 5 *OMCB Opinions* 42, 47-48 (2006). On the other hand, we held that notice given on the day of a meeting that had been scheduled six days earlier violated the Act. 4 *OMCB Opinions* 6, 9 (2004).

The justification for the brief notice provided in advance of the December 29 meeting was the desire to finalize action on an annexation before the first of the year in order to avoid certain statutory changes.<sup>3</sup> The implication is that this looming deadline only came to the governing body's attention on December 28 and necessitated the next day's meeting. Frankly, we are amazed that a municipality considering an annexation issue would not have been aware of the statute, and hence of the need to meet before the end of the year to avoid its effect, long before that. This legislation became effective on October 1, 2006; the Governor had signed the bill into law five months earlier, on May 2, 2006. Throughout the legislative session, the Maryland Municipal League ("MML") regularly advises municipal officials on legislative developments. Following each session, the MML makes available to municipal officials a report on legislation affecting municipalities. In 2006, Part III of MML's report was devoted solely to the legislation at issue.

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<sup>2</sup> All statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

<sup>3</sup> The response cited House Bill 1141. This bill, which became Chapter 381, Laws of Maryland 2006, exempted from the statutory changes certain annexations completed before the first of the year:

SECTION 5. AND BE IT FURTHER ENACTED,  
That this Act shall be construed to apply only prospectively  
and may not be applied or interpreted to have any effect on  
or application to any annexation:

(a) that was initiated either by resolution, in  
accordance with § 19(b) of Article 23A of the Code, or by  
written petition, in accordance with § 19(c) of Article 23A  
of the Code, before the effective date of this Act; and

(b) in which final enactment of the  
annexation resolution, as described in § 19(e) of Article 23A  
of the Code, will occur by January 1, 2007.

Nevertheless, skeptical as we may be, the record before us does not actually reveal when the governing body of New Market discovered the need to act before January 1 in order to avoid these statutory changes. If the governing body was unaware of this need until December 28, the day before the meeting when notice was actually provided, no violation occurred. On the other hand, had the governing body been aware of the statutory deadline, yet delayed scheduling the meeting until December 28, reasonable notice was not provided as required by the Act.<sup>4</sup>

### **III**

#### **Meeting of January 11, 2007**

##### ***A. Notice***

We understand that the decision to meet on January 11 was made at the close of the meeting the evening before, when a motion was adopted to continue the meeting the next night. Whether seen as a continuation of the January 10 session or as a new meeting, in our view, notice was required. Under the circumstances, however, the period of notice was by necessity brief. According to the complaint, notice was posted at 1:00 p.m. the day of the meeting. Given that the meeting was announced the previous evening and notice was in fact posted during the next business day, we find that no violation occurred. *Compare 4 OMCB Opinions 51, 55 (2004).*<sup>5</sup>

The complaint indicated that there was no notice that part of the session would be closed. The Act's notice requirements require that, "if appropriate, [the notice is to] include a statement that a part or all of a meeting may be conducted in closed session." § 10-506(b)(3). Because the response failed to address this aspect of the complaint or supply a copy of the notice, the only opinion we can offer is contingent: If the notice indicated that a part of the meeting might be closed, this requirement of the Act was satisfied. Assuming, on the other hand, that a closed meeting with counsel was anticipated at the time notice was posted, failure to note the probable closure would have violated the Act.

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<sup>4</sup> While notice was e-mailed to you and others approximately 6:00 p.m. the evening before the notice, e-mail to select citizens would not constitute satisfactory notice under the Act. *4 OMCB Opinions 178, 179 (2005)*. However, the response indicated that notice also was promptly posted on the Town's bulletin board; if the public was aware of this practice, the method of giving notice was in compliance with the Act. § 10-506(c)(3).

<sup>5</sup> The better practice would have been to post the notice first thing in the morning, rather than waiting until midday. The few hours' difference, however, is not enough to be deemed a violation.

***B. Documentation Before Closing***

Before a public body meets in a closed session under the Act, it must first conduct a vote on whether to close the session and the presiding officer must complete a written statement of the reason for closing the meeting, citing the applicable authority under the Act, and listing the topics to be discussed. § 10-508(d)(1) and (2).

While a vote was apparently conducted, we interpret Mr. Wantz's explanation that he would remind the Mayor as to his duties in documenting the closure as an acknowledgment that this process was not followed. The failure to do so violated the Act. § 10-508(d)(2)(ii); *see, e.g., 3 OMCB Opinions* 233, 240 (2002). We encourage the governing body to consider employing the form recommended by the Attorney General as an aid in ensuring future compliance. *See Open Meetings Act Manual* App. C (6<sup>th</sup> ed. 2006).

***C. Documentation After a Closed Meeting***

Following a closed session, a public body must make public certain information as part of publicly available minutes:

If a public body meets in closed session, the minutes of its next open session shall include:

- (i) a statement of the time, place, and purpose of the closed session;
- (ii) a record of the vote of each member as to closing the session;
- (iii) a citation of the authority under this subtitle for closing the session; and
- (iv) a listing of the topics of discussion, persons present, and each action taken during the session.

§10-509(c)(2). Recognizing that the practice results in earlier disclosure, we have approved the practice of documenting a closed session in the minutes of a public session conducted the same date. *4 OMCB Opinions* 88, 97 (2004).

The response included a copy of the governing body's minutes of January 11, 2007, in which the closed session held that date was documented. However, the documentation was legally deficient. The minutes failed to reference the vote as to closing the meeting and failed to provide the statutory citation relied on in closing the session, § 10-508(a)(7). Furthermore, the minutes failed provide an adequate explanation of the topic of discussion, in that the minutes simply noted that the purpose "was to confer with the town legal counsel, Mr. William Wantz." While the documentation of a closed session is not expected to include a level of detail that would defeat the desired confidentiality justifying the closed session, we have repeatedly reminded public bodies that merely paraphrasing the applicable exception is not sufficient. *See, e.g., 4 OMCB Opinions* 38, 41-42 (2004). For example, the minutes could have reflected as the topic of discussion the detail provided in the governing body's response to this complaint without compromising the basis for the closed session.

#### **IV**

#### **Conclusion**

We question the adequacy of the notice provided by the governing body of the Town of New Market in advance of its December 29 meeting; however, based on the limited record before us, we are only able to reach a contingent conclusion as to this issue. No violation occurred in connection with the timing of the notice provided in advance of the January 11 meeting. However, the Act's requirements about documentation of a closed session, both before and after the session, were violated.<sup>6</sup>

OPEN MEETINGS COMPLIANCE BOARD

*Courtney J. McKeldin*  
*Tyler G. Webb*

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<sup>6</sup> While the complaint noted that there has been a history of violations and requested an inquiry of the Town's practices, the Compliance Board is not an investigatory body and generally must rely on information in the record. The response addressed only the two meetings specifically identified in the complaint. Therefore, we have limited our discussion to these two meetings.